UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SODEXO AMERICA LLC

And

Case 21-CA-39086

PATRICIA ORTEGA, an Individual

SODEXO AMERICA LLC; AND
USC UNIVERSITY HOSPITAL

And

Case 21-CA-39109

SERVICE WORKERS UNITED

USC UNIVERSITY HOSPITAL

and

Cases 21-CA-39328
21-CA-39403

NATIONAL UNION OF
HEALTHCARE
WORKERS

RESPONDENT KECK HOSPITAL OF USC'S MOTION FOR RECONSIDERATION OF JUNE 13 ORDER

LINDA VAN WINKLE DEACON (State Bar No. 60133)
1107 Fair Oaks Avenue #356
South Pasadena, California 91030
Telephone: (213) 248-4806 - Facsimile: (818) 952-7402
lindaedeacon@gmail.com
Attorney for Respondent Keck Hospital of USC,
formerly known as USC University Hospital

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RESPONDENT KECK HOSPITAL OF USC'S
MOTION FOR RECONSIDERATION OF JUNE 13, 2013 ORDER

Pursuant to Section 102.48 (D), Keck Hospital of USC (the "Hospital") moves for Reconsideration of the Decision and Order of the National Labor Relations Board ("Board") issued on June 13, 2013 on the grounds that it is unconstitutionally vague, has no basis in the record, and exceeds the Board's jurisdiction. This Motion is timely. On July 9, 2013 an extension of time to file its motion was granted to the Hospital. This motion is filed on or before July 29, 2013, the date set forth in the extension.

I. PROCEDURAL HISTORY

On November 24, 2010, Region 21 of the National Labor Relations Board filed a consolidated complaint against the Hospital and Sodexo America, LLC. In this consolidated action, it was alleged, among other things, that the Hospital had committed an unfair labor practice by maintaining a facially invalid off duty access policy and by disciplining four employees for violating the policy. On April 8, 2011, Administrative Law Judge William G. Kocol ("ALJ") ruled that the policy was not overbroad, and dismissed the complaint. On July 3, 2012, the Board issued a Decision and Order ("Initial Order") overturning the ALJ's decision. (Sodexo America, LLC and USC University Hospital, et al. 358 NLRB

No. 79.) The Board's Initial Order contained, essentially, three requirements: 1) that the Hospital take certain steps to rescind and/or modify its policy; [1] 2) that the Hospital and Sodexo post a notice; and 3) that the ALJ reopen the record to take testimony as to the activities of the four employees who had been disciplined as a result of violating the off duty access policy. 358 NLRB No. 79, 3.

Motions to reconsider the Initial Order were brought by both the Hospital and Sodexo, which were denied on September 27, 2012. Both the Hospital and Sodexo filed Petitions for Review of the Initial Order and of the denial of the Motions for Reconsideration with the Court of Appeals for the District of Columbia Circuit, arguing, among other things, that the Board was not properly constituted and therefore had no authority to issue the Initial Order, and that, in any event, the policy was lawful. These Petitions were filed on October 15, 2012 and October 19, 2012 respectively. On November 28, 2012, the Board filed its Cross Petition for Order of Enforcement as to the entire Decision and Order of the Board. At that time, the Board filed its certified index to the record with the Court of Appeals.

[1] Specifically, the Hospital was instructed to cease and desist from "(a) Promulgating, maintaining and enforcing a rule which limits off-duty access to the Hospital's facility for some purposes while permitting access for other purposes. (b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act."

On November 29, 2012, the Hospital advised the Region and the ALJ of the perfecting of the matter before the Court of Appeals, and requested that further proceedings be taken off calendar unless and until the Board once again had jurisdiction over these cases. On November 30, 2012, the ALJ denied the request and ordered that the remand hearing go forward on December 5, 2012.

On December 2, 2012, the Hospital filed a Request for Special Permission to Appeal the Interlocutory Order. On December 5, 2012 the hearing on remand was conducted, and the ALJ issued his decision on January 18, 2013. Both the hearing on remand and the decision of the ALJ on remand addressed only the activities of the four employees. Counsel for the General Counsel and the Hospital filed timely exceptions on February 6, 2013 and March 14, 2013, respectively. On June 13, 2013 the Board issued its Decision and Order on the remand portion of the case. ("Remand Order"). (Sodexo America, LLC, et al, 359 NLRB No. 135) The Hospital now files a Motion for Reconsideration of that Remand Order.[2]

[2] By bringing this Motion to Reconsider the Hospital is not intending to waive and does not waive any of the objections that it has raised to the Initial Order in its prior Motions for Reconsideration and its Petition for Review filed with the Court of Appeals for the District of Columbia Circuit, nor does the Hospital concede that the Board as authority to act.

II. THERE IS MATERIAL ERROR IN THAT THE REMAND ORDER IS UNCONSTITUTIONALLY VAGUE

The Hospital is subject to a contempt citation if it violates the Remand Order. *Hoffman Plastic Compounds, Inc. v. N.L.R.B*, 535 U.S. 137, 152, 122 S.Ct. 1275, 1285 (U.S., 2002) citing *NLRB v. Warren Co.*, 350 U.S. 107, 112–113, 76 S.Ct. 185 (U.S., 1955) (Congress gave the Board civil contempt power to enforce compliance with the Board's orders). The United States Supreme Court long ago recognized: "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one." *International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n* 389 U.S. 64, 76, 88 S.Ct. 201, 208 (1967). Accordingly, parties at risk of contempt citations for failing to obey an order must know what the order "intends to require and what it means to forbid." *Id.*

Thus, in order to be enforceable, an injunction must be specific and describe in reasonable detail the acts restrained or the conduct proscribed or required. *Fed.R.Civ.P.* 65(d) (every order "shall be specific in terms"); *Statter & Co. v. Able,* 870 F.2d 1158, 1163 (7th Cir. 1989) (to hold a party in contempt, the district court must be able to point to a decree that sets forth in specific detail an unequivocal command which the party violated); *CF&I Steel Corporation v.*

United Mine Workers of America, 507 F.2d 170, 173 (10th Cir. 1974) (order is vague if it lacks particularity); N. L. R. B. v. Heck's, Inc., 388 F.2d 668, 670 (4th Cir. W.Va. 1967)(An order of the Board must comply with FRCP 65). The rule's specificity requirement is substantive, not merely technical. *Schmidt v. Lessard*, 414 U.S. 473, 94 S.Ct. 713, 715, 38 L.Ed.2d 661 (1974). Rule 65(d) is "designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood... Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Id.; See also Guilday v. Dubois*, 124 F.3d 277, 283, 286 (1st Cir. 1997) (party must be able to determine from the four corners of the order what acts are forbidden; ambiguities construed in favor of the alleged contemptor.)

The common law analogue to FRCP 65(d) is the "void for vagueness" doctrine, a procedural due process concept which requires the giving of appropriate notice of a proscription before a person can be held accountable for its violation. *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). Thus, a government regulation or order can neither forbid nor require "the doing of an act in terms so vague that men of

common intelligence must necessarily guess at its meaning and differ as to its application ..." *Id.* (citations omitted).

An order will be found void for vagueness under either of the following circumstances:

(1) If the order fails to provide "fair warning" as to what conduct will subject a person to liability. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); or

(2) If the order fails to provide an explicit and ascertainable standard to prevent those charged *with* enforcing the order from engaging in "arbitrary and discriminatory" enforcement. *See Grayned v City of Rockford*, 408 U.S. 104,108–09, 92 S.Ct. 2294 (1972).

Here, the Remand Order is hopelessly vague under either test. Pursuant to the Remand Order, the Hospital must refrain from:

> Threatening to arrest, verbally warning, suspending, demoting, or otherwise disciplining employees who violate *unlawful rules* by engaging in conduct that implicates the concerns underlying Section 7 of the Act. (italics added)

The Hospital cannot possibly know in advance of enforcing a particular rule, whether the Board will consider that rule "unlawful." Indeed, in this very case, the ALJ found that the disputed policy was NOT unlawful. As the Board is well aware, there often are similar good faith disputes about whether a particular

policy or rule is unlawful.[3] The Remand Order is akin to an injunction requiring a party to "comply with all applicable laws," which courts have repeatedly found too vague to enforce. *See, e.g., Hartford-Empire Co. v. U.S.*, 323 U.S. 386, 410, 65 S.Ct. 373, 385 (U.S. 1945) ("The decree must not be so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt [and] enjoin all possible breaches of the law."); *U.S. v. Pentrack,* 428 F.3d 986, 990 (C.A.10 (Utah), 2005) (generally, injunctions simply requiring the defendant to obey the law are too vague).

The Remand Order fails to give the Hospital "fair warning" about what conduct is prohibited. "Violating unlawful rules" is an amorphous description of behavior with no explanation or context. The Remand Order does not contain any "explicit and ascertainable standard" to prevent arbitrary enforcement.

[3] The Board's own test for whether a work rule violates Section 8(a)(1) makes clear that a detailed inquiry is often required in order for a work rule to be found "unlawful." In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd 203 F.3d 52 (D.C. Cir. 1999). Under the test enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if the rule explicitly restricts Section 7 rights, it is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647. A rule does not violate the Act if a reasonable employee merely could conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee would read the rule as prohibiting Section 7 activity. *Id.* The question of whether a rule or policy violates the Act requires a balancing between an employer's right to implement certain legitimate rules of conduct in order to maintain a level of productivity and discipline at work, with the right of employees to engage in Section 7 activity. *Firestone Tire & Rubb*, 238 NLRB 1323, 1324 (1978).

In contrast to the Remand Order, the Initial Order was sufficiently specific to put the Hospital on notice as to what conduct would subject it to a contempt proceeding for its violation. The Initial Order prohibits the Hospital from "threatening to arrest, verbally warning, suspending, demoting, or otherwise disciplining employees *because they enter the Hospital while off duty* to engage in conduct that implicates concerns underlying Section 7 of the Act." (Italics added). This Initial Order is tied to the conduct that was actually litigated (the off duty access rule), and describes specific behavior – entering the Hospital while off duty. Under the Initial Order, the Hospital is at least on notice that disciplining employees for entering the Hospital while off duty to discuss wages, hours, or working conditions is prohibited.

The off-duty access policy was the only policy at issue in this case. Furthermore, only the facial validity, not the application, of the policy was litigated. There was no evidence or argument presented about any other policy, and certainly no discussion of any standard by which some future policy on some unknown subject might be considered to be illegal. Yet, the Remand Order is written such that if, at some point in time in the future, after a trial on the merits, some disciplinary action is found to have been taken on behalf of a policy now deemed to be illegal, the Hospital is faced with a potential contempt citation.

Consistent case law makes it clear that the Remand Order is unconstitutionally vague. Accordingly, the Hospital urges the Board to reconsider and reinstate the Initial Order.[4]

III. THERE IS MATERIAL ERROR IN THAT THERE IS NO JUSTIFICATION IN THE RECORD FOR ANY BROAD ORDER AGAINST THE HOSPITAL

Although courts give special deference to the Board's choice of remedy because of its expertise (*NLRB v. Gissel Packing,* 395 U.S., 575, 612 n. 32, 89 S.Ct. 1918 (1969)), the Board is, nonetheless required to restrict itself to orders that "effectuate the policies of the Act. 29 U.S.C. § 160(c); *see also Virginia Elec. & Power Co. v. NLRB,* 319 U.S. 533, 540, 63 S.Ct. 1214, 87 L.Ed. 1568 (1943). Unless the Board might reasonably have concluded from the evidence in this record that the Remand Order was necessary to prevent the employer from continuing to engage in unfair labor practices, the Board's order in this case is overbroad and unenforceable. *See May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 390, 66 S.Ct. 203, (1945).

The prototypical "broad order" is one containing a provision generally prohibiting the employer from violating in any manner the rights guaranteed to

[4] The Hospital disputes the propriety of the Initial Order on a number of grounds set forth in the Motion to Reconsider and the Petition for Review. However, the Hospital acknowledges that the Initial Order is not unconstitutionally vague.

its employees under the NLRA. *NLRB v. Windsor Castle Health Care Facilities, Inc.*, 13 F.3d 619, 624 (2d Cir.1994)); *see also Hickmott Foods, Inc.*, 242 N.L.R.B. 1357, 1357 (1979) (distinguishing a "broad" order, which prohibits employer from violating employees' rights "in any manner," from a "narrow" order, which prohibits employer from violating rights in any manner "like or related" to previous violations). A broad order is justified "only when a respondent is shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Windsor Castle*, 13 F.3d at 624 (internal quotation marks omitted). Other factors courts rely on in deciding whether an order is too broad include (1) the number of violations as compared to the number of unaffected parties and facilities, (2) the types of violations, (3) the corporate control over, or causation of, the unfair labor practices, and (4) the publicity of the unfair labor practices among the employees. *See Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 586 (2nd Cir. 1994); *Blount Brothers Corp. v. NLRB*, 571 F.2d 4, 4–5 (7th Cir.1978).

The underlying litigation embodied none of the factors that might justify a broad order. The case involved one challenge to one off duty access policy, based on nothing but claimed facial invalidity. There was no allegation or

evidence, let alone any finding, of any kind of disparate enforcement, of any union animus, of a pattern or practice of enforcing illegal policies[5], of any propensity for violating the National Labor Relations Act, of any history of unfair labor practices– nothing that would remotely suggest that a broad order against all discipline of any employee at any time in the future for violating any policy that might ever be found to be illegal could or should be the subject of this Remand Order. A broad remedial order was never requested by Counsel for the Acting General Counsel, was never the subject of any evidence, and was never argued or addressed in any way before the ALJ or this Board. The Board simply issued the Remand Order, *sue sponte,* with no reference to any finding, evidence, (or even argument) in the record.

Board Orders are provided to "remedy" proven violations (i.e. to "undo the effects of unfair labor practices"). *Sure-Tan v. NLRB,* 467 U.S. 884 at 899, 104 S.Ct. 2803 (1984). Therefore, "the proposed remedy [must] be tailored to the unfair labor practice it is intended to redress". *Id* at 900. Because the Remand Order is broad, not tailored to a specific unfair labor practice and without any support in the record, it must be reconsidered. Courts simply will not enforce broad remedial orders not tied in any way to the conduct litigated.

[5] Indeed, as noted above, the ALJ found the policy in this case to be valid, legal and enforceable.

IV. THERE IS MATERIAL ERROR IN THAT THE BOARD HAS CONCEDED THAT IT HAD NO JURISDICTION TO ISSUE THE ORDER

After the Board issued its Initial Order, the Hospital argued that the remand should not go forward because the Board had transferred the entire matter to the Circuit Court of Appeals for the D.C. Circuit by filing a petition for enforcement and transferring the record on appeal. In this Remand Order, the Board acknowledges that it had transferred the record to the D.C. Circuit, but states: "But we severed and remanded to the judge for further proceedings the issue of the legality of the discipline meted out pursuant to the unlawful no-access rule. Thus, the Board retained jurisdiction over that part of the case". (Decision of June 13, 2013, Ftnt 3, p. 1, *emphasis added*)

Although the Hospital contests the assertion that the Board retained jurisdiction over ANY aspect of this case, even the Board, in this Remand Order, acknowledges that the ONLY aspect of the case over which it even purported to retain jurisdiction was that portion pertaining to the individual discipline administered to the four employees who had violated the no access rule. In fact, the specific direction to the ALJ was to reopen the record to determine whether "Michael Torres, Ruben Duran, Alex Correa, and Noemi Aguirre were engaged in activities implicating the concerns underlying Section 7 of the Act", and if so

to formulate a remedy for these four individuals. The other aspects of the Initial Order were not before the ALJ on remand, were not before the Board in this part of the case, had been transferred to the D. C. Circuit Court of Appeal, and were no longer subject to the jurisdiction of the Board. The Board by its own admission retained no jurisdiction over the Initial Order except to the extent that it addressed the individual discipline of four employees.

Yet the Board's Remand Order of June 13, 2013 changes aspects of the Initial Order that have nothing to do with the individual discipline given to the four employees. The Board has constructed a broad remedial order pertaining to unknown future employees who might be disciplined for unknown future actions in contravention of unknown future policies that might be held to be illegal. Even within the terms of its own claims about what it had a legal right to do, the Board does not claim to have retained jurisdiction to rewrite its Initial Order to that extent.

Because the parties addressed, in good faith, the only issues submitted to the ALJ on remand, there was nothing more than a limited stipulation concerning the conduct of these four employees on two days. No other evidence was taken, addressed or even considered. Most certainly, no evidence was adduced

concerning any broad based order against all manner of undisclosed future conduct, concerning unknown future employees, and unknown future policies.

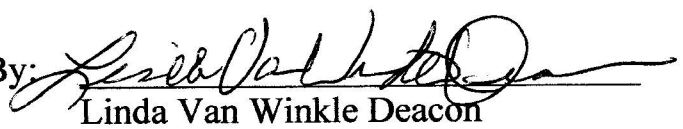
Since the Board, by its own admission, did not retain jurisdiction over any aspect of this case except the discipline accorded to four employees, it had no jurisdiction to issue the broad based Remand Order against the Hospital's future conduct. The Remand Order must be reconsidered.

V. CONCLUSION

Because the Remand Order is unconstitutionally vague, is not based on or tethered to any evidence, or finding in the record, and exceeds the Board's admitted jurisdiction, the Remand Order must be reconsidered.

Dated: July 29, 2013

Respectfully submitted,

By: 

Linda Van Winkle Deacon
Attorney for Respondent
Keck Hospital of USC
E-mail: lindaedeacon@gmail.com

CERTIFICATE OF SERVICE

21-CA-39086 - 21-CA-39109 - 21-CA-39328 - 21-CA-39403

I, hereby certify that on July 29, 2013, I electronically filed the foregoing document with the National Labor Relations Board using its e-filing system and served a copy of the forgoing document by electronic service as indicated to the following persons as listed below.

Zelda Davis

Ms. Patricia Ortega 2107 Common Wealth Avenue Apt. D-369 Alhambra, CA 91803 E-mail: opatricia491@gmail.com	Mark T. Bennett, Esq. Marks, Finch, Thornton & Baird, LLP 4747 Executive Dr., Suite 700 San Diego, California 92121-3107 E-mail: mbennett@mftb.com
Alice Garfield, Region 21 National Labor Relations Board 888 South Figueroa Street, Ninth Floor Los Angeles, CA 90017 E-mail: alie.garfield@nlrb.gov	Florice O. Hoffman, Esq. Law Offices of Florice Hoffman 8502 East Chapman Avenue, #353 Orange, California 92869 E-mail: fhoffman@socal.rr.com
Antonio Orea National Union of Healthcare Workers 8502 East Chapman Avenue, Suite 353 Orange, CA 92869 E-mail: aorea09@gmail.com	Bruce A. Harland, Esq. Weinberg, Roger, & Rosenfeld 1001 Marina Village Parkway, Suite 200 Alameda, CA 94501 E-mail: bharland@unincounsel.net